

² For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

OWCP accepted that appellant sustained sciatica of the left side and a herniated disc at L5-S1 due to running to answer a code blue alarm. On February 16, 1999 she underwent discectomy surgery at L4-5 which was authorized by OWCP. Appellant received wage-loss compensation for periods of disability.

In January 2000, appellant filed a claim for a schedule award due to her accepted work injuries. In a January 30, 2002 decision, OWCP granted her a schedule award for a four percent permanent impairment of her left leg. The award was based on an opinion of Dr. Jeffrey K. Kachmann, an attending Board-certified neurosurgeon.

In an August 27, 2007 report, Dr. Kachmann determined that appellant had a 33 percent permanent impairment of her left leg. OWCP found that he did not adequately explain how he rated this impairment rating and referred her to Dr. Charles Kershner, a Board-certified orthopedic surgeon, for further evaluation and an opinion on impairment. In a January 22, 2008 report, Dr. Kershner determined that appellant had a 29 percent permanent impairment of "both lower extremities" under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

In a December 17, 2008 decision, OWCP granted appellant schedule awards for an additional 25 percent permanent impairment of her left leg and a 29 percent permanent impairment of her right leg. The awards were based on the January 22, 2008 report of Dr. Kershner.

In a January 13, 2009 report, Dr. Kershner clarified that his January 22, 2008 report denoted 29 percent impairment as a combined value for both legs. There is no indication in the record that this report was solicited by OWCP.³ In a February 10, 2009 report, an OWCP medical adviser determined that the examination findings of Dr. Kershner did not show any impairment in appellant's legs noting that the physician used a table of the A.M.A., *Guides* intended for the evaluation of impairment of the back.

OWCP referred appellant to Dr. Alois E. Gibson, a Board-certified orthopedic surgeon, for further evaluation of her leg impairment. In an April 28, 2009 report, Dr. Gibson determined that appellant had a nine percent permanent impairment of her left leg and a nine percent permanent impairment of her right leg under the standards of the sixth edition of the A.M.A., *Guides*.

³ In a March 24, 2009 letter to appellant, an OWCP official stated with respect to the January 13, 2009 report of Dr. Kershner, "The report was apparently obtained by your employing agency without our knowledge."

In a November 3, 2009 decision, OWCP amended the December 17, 2008 decision. It granted appellant a schedule award for a five percent permanent impairment of her left leg and a nine percent permanent impairment of her right leg.⁴

In a February 7, 2011 letter, received on February 10, 2011, appellant stated that she realized that the time frame for a challenge had passed but “requested reconsideration because of medical issues. She received OWCP’s November 3, 2009 decision, the same month that her 90-year-old mother became extremely ill. Appellant’s mother was in and out of the hospital for months and passed away early in 2010. Appellant noted that the health of her 94-year-old father started to decline and he also needed care prior to his death later in 2010. Her husband was also hospitalized to rule out cardiac problems and most recently her son had lower back problems that required medical and surgical care. Appellant stated that she was working on a full-time basis and was trying to care for her family. She stated that OWCP concerns, were not at the top of her “to do list.” Appellant indicated that an OWCP official told her that it frequently took medical issues in to account in the appeal process. She stated, “I feel that an injustice was done to me and would like to appeal the amended award, but I need a waiver for the listed time frame.” Appellant did not submit any evidence in support of her reconsideration request.

In a February 15, 2011 decision, OWCP denied appellant’s request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. It found that she requested reconsideration in a February 7, 2001 letter received more than one year after the issuance of its November 3, 2009 decision and her application for review did not establish clear evidence of error in that decision.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁷ OWCP regulations and procedure provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in

⁴ OWCP noted that, on January 30, 2002, appellant had received a schedule award for a four percent permanent impairment of her left leg.

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³

ANALYSIS

In its February 15, 2011 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on February 10, 2011, more than one year after OWCP's November 3, 2009 decision and therefore she must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

In connection with her untimely reconsideration request, appellant asserted that medical problems of family members prevented her from requesting reconsideration of her claim at an earlier date and requested a waiver of the time frame for reconsideration. However, she did not identify any basis on which the one-year time period for filing a timely reconsideration request should be waived in her case. More importantly, appellant's argument does not tend to show that OWCP erred in issuing its December 3, 2009 schedule award decision because the relevant issue of the present case, *i.e.*, the extent of her permanent leg impairment, is medical in nature and generally would be resolved by the submission of probative medical evidence. She did not submit any evidence in connection with her reconsideration request. On appeal, appellant argued that an agency official improperly contacted an OWCP referral physician and OWCP improperly used a supplemental report produced by that physician to further develop her claim. However, she did not identify any relevant precedent, combined with the evidence of record that would clearly show that OWCP improperly developed her claim for schedule award compensation. This argument would not tend to show that OWCP's November 3, 2009 decision was in error.

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004). OWCP procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated)."

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

For these reasons, appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its November 3, 2009 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error. The argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's November 3, 2009 decision and OWCP properly determined that she did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board